CONDEMNATION BY CITY OF STREET WITHIN OTHER MUNICIPALITY ENJOINED ON THE PLEADINGS

Village of Blue Ash v. City of Cincinnati
173 Ohio St. 345, 182 N.E.2d 557 (1962)

The village of Blue Ash brought suit to enjoin condemnation proceedings initiated by the city of Cincinnati to appropriate a public street within the corporate limits of Blue Ash for the establishment of an airport. The property near the street had been purchased by Cincinnati before Blue Ash became incorporated. The proposed construction plans required the bisecting of the street by the principal runway, and there was no feasible alternative location for the airport or the runway. Cincinnati offered Blue Ash adjacent property owned by Cincinnati over which the street could be relocated. The court of common pleas sustained a demurrer to Cincinnati's answer,[1] but the court of appeals reversed. The Supreme Court of Ohio, with two judges dissenting, reversed for Blue Ash, holding that a general grant of power from the legislature to municipal corporations would be improperly exceeded in an appropriation of property already in public use in another municipality where the appropriation would wholly defeat the present public use of the property. Therefore, the court held, injunctive relief was a matter of strict right.[2]

The case is one of first impression in Ohio, and no decisions on the precise question involved could be found by the writer in other jurisdictions. Of course, the village of Blue Ash has a right to the use of its streets,[3] and it exercises a governmental function in the maintenance and control of these streets.[4] But municipal corporations have been granted the power to acquire property, within or without corporate limits, for the purpose of establishing airports and other public utilities.[5] It is well-established that property al-

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[1] The court treated a motion to strike Cincinnati's second amended answer as a demurrer.

[2] Village of Blue Ash v. City of Cincinnati, 173 Ohio St. 345, 182 N.E.2d 557 (1962).

[3] Ohio Const. art. XVIII, § 3 (1912); Ohio Rev. Code § 723.01 (1953).

[4] Standard Fire Ins. Co. v. City of Fremont, 164 Ohio St. 344, 131 N.E.2d 221 (1955); City of Wooster v. Arbens, 116 Ohio St. 281, 156 N.E. 210 (1927).

[5] Ohio Const. art. XVIII, § 4 (1912) provides:

> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Ohio Rev. Code § 717.01 (1953), reads in part:

> Each municipal corporation may:
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> . . . .
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> (V) Acquire by . . . condemnation proceedings, or otherwise, real or personal property . . . to establish, construct . . . equip, maintain and operate airports,

ready in public use cannot be acquired for a different public purpose where the proposed use will destroy or materially impair the existing use, except by an express grant from the legislature or where it is implied by necessity from a general grant of power.[6] This rule has been reiterated by the Ohio courts[7] as well as those of other states.[8] Generally, however, where the proposed use of the property is of greater benefit to the public than the existing use, acquisition of the public land has been upheld where no limitation applicable to the proposed use was expressed in the grant by the legislature.[9] Although the power granted in Ohio Revised Code section 717.01 is not expressly extended to property already in public use in a neighboring municipality, there is no limitation in the statute which would prevent the exercise of the power proposed in the instant case.[10] Therefore, it would appear that Cincinnati might have the power to acquire the street owned by Blue Ash, depending upon the merits of its case and the balance of interests involved.

In a recent Ohio case a county sought to appropriate, for the construction of an airport, a twenty-three acre tract of land which an incorporated village within the county had acquired for a recreational park and the construction of municipal buildings. The county appropriation was upheld except for that portion of the tract necessary for the construction of the municipal buildings. The decision was based on a balancing of the benefits and inconveniences to the parties. The county and the village were on a co-equal basis in terms of constitutional power, yet the case was heard on the merits, and decided by balancing the competing interests of the governmental units involved.[11]

The theory of the right of eminent domain is based on an overwhelming public need for the land which is appropriated. The owner's constitutional rights must necessarily be interfered with, and the justification for the inter-

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landing fields, . . . either within or without the limits of a municipal corporation. . . . No municipal corporation may take or disturb property or facilities belonging to any public utility, or to a common carrier which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, relocation or duplication of such property or facilities elsewhere at the sole cost of the municipal corporation.

See also Ohio Rev. Code § 719.01(*0*) (1953).

[6] Byfield v. City of Newton, 247 Mass. 46, 141 N.E. 658 (1923); Northern Pac. Ry. v. City of Duluth, 153 Minn. 122, 189 N.W. 937 (1922); Twin City Power Co. v. Savannah River Electric Co., 163 S.C. 438, 161 S.E. 750 (1930).

[7] Board of Educ. of City of Akron v. Proprietors of Akron Rural Cemetery, 110 Ohio St. 430, 144 N.E. 113 (1924); Cincinnati, S. & C.R.R. v. Belle Centre, 48 Ohio St. 273, 27 N.E. 464 (1891).

[8] See cases cited note 6 *supra.*

[9] If granting an injunction will cause more harm to the defendant than benefit to the plaintiff, it should generally be refused. See Goodall v. Crofton, 33 Ohio St. 271, 31 Am. Rep. 535 (1878).

[10] See authorities cited note 5 *supra.*

[11] Village of Richmond Heights v. Board of County Comm'rs, 112 Ohio App. 272, 166 N.E.2d 143 (1960), *appeal dismissed,* 171 Ohio St. 449, 172 N.E.2d 133 (1961), noted 13 W. Res. L. Rev. 510 (1962); 12 W. Res. L. Rev. 516 (1961).

ference is that the power to acquire property is essential to state administration if it is to function effectively for the welfare of the public. If it is also in the public interest to protect the rights of the present owner of the property, the conflict is resolved by a consideration of the circumstances and a balancing of the interests involved to determine whether there is such a paramount need for the property that the rights of the owner must be sacrificed for the greater public interest. Why should there be a distinction where the owner of the land is a municipal corporation? The fact that Blue Ash is on a co-equal basis with Cincinnati would no doubt be an important factor in the court's decision in the instant case, but it should be merely another circumstance to be considered. If the instant case had been heard on the merits, the court might have found that the proposal of Cincinnati to relocate and reconstruct the highway in question would avert the destruction or material alteration of the present public use.[12] The court viewed the proposed use of the property as entirely destroying the existing use. But since the purpose of the street is to provide a convenient passageway for traffic, it would seem that a suitable alternate location for the street would certainly avoid the destruction of its usefulness. It is difficult to see how the usefulness of a street could be so tied to a given location that, as a matter of law, any relocation would be tantamount to destruction of the street. Cincinnati alleged that a suitable alternate route was available, and this allegation was admitted by the court for the purpose of sustaining the demurrer. Should not the court have examined this alternate route before ruling that relocation would result in the destruction of the usefulness of the existing roadway?

The constitutional grant of power could be so interpreted to imply the power to acquire the property in question, notwithstanding the present public use.[13] This result could be reached on the theory of implied necessity in the statute granting the power. Because of the large area required for the establishment of an airport, the power to appropriate land already in public use can be properly inferred from the statute. The legislature must have intended to provide municipalities with the power to acquire land necessary for the construction of airports within a reasonable distance from the city. The length of runways necessary for a modern airport is rapidly increasing and will soon reach four miles.[14] Municipalities may find themselves hard-pressed to acquire suitable locations without interfering with state and city thoroughfares. If the acquisition of the only possible location available requires the condemnation of a street within another municipality, then the power to take must be implied from the purpose for which the statute was enacted.[15] This

[12] Fry v. Jackson, 264 S.W. 612 (Tex. Civ. App. 1924), which upheld the condemnation of a county road by a municipality where the alternate route was six miles away.

[13] See authorities cited note 5 *supra*.

[14] Note, "Zoning—The Airport and the Land Surrounding It in the Jet Age," 48 Ky. L.J. 273 (1960).

[15] Village of Richmond Heights v. Board of County Comm'rs, *supra* note 11, at 281, 166 N.E.2d at 150:

Thus, when the only land available for a particular public work is already

interpretation seems particularly applicable to the instant case, because Cincinnati stated that the proposed airport could not be constructed without the acquisition of the street in question, and this allegation alone should be sufficient to warrant a trial on the merits.

An unusual approach to a problem similar to the one raised by the principal case was taken by the Supreme Court of Errors of Connecticut which held that public streets are within the scope of the word *land* under a grant of power from the legislature authorizing Railroad Commissioners to appropriate land for the construction of railroad stations. The controversy arose over the condemnation of portions of three city streets by the Railroad Commissioners. When the city attempted to enjoin the condemnation, the court took the view that streets and highways are public easements in land, and cannot exist separately from the land. Accordingly, streets were held to be part of the land included in the grant of power.[16] This interpretation would put the acquisition of public streets within the power expressly granted to the Railroad Commissioners by the legislature. If applied to the instant case, such an interpretation would remove the existing public use as a bar to the appropriation.[17] The theory applied by the Connecticut courts attempts to distinguish the interest of the municipality in its streets from that in other property in public use. This distinction would probably be rejected in Ohio on the basis that the interest of a municipality in city streets is more than a mere easement,[18] but the case is illustrative of the variety of holdings which have supported the right to condemn public streets within a municipal corporation.

The dissenting opinion in the instant case considers the grant under article XVIII, section 4 of the Ohio Constitution as an unqualified or plenary one,[19] subject only to the consideration of a greater public need.[20] There are many cases in Ohio supporting this view,[21] and since no express limitations on the power appear in the grant which affect the instant case, there should be no constitutional bar to the appropriation of the street by Cincinnati.[22]

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devoted to the public use, the power to take it may be inferred from a comparison of the conflicting powers conferred by the statute as well as the nature of the public works respectively to be undertaken.

See also Old Colony R.R. v. Framingham Water Co., 53 Mass. 561, 27 N.E. 662 (1891); In Matter of Application of Mayer, 135 N.Y. 253, 31 N.E. 1043 (1892).

16 State *ex rel.* New Haven & D. R.R. v. Railroad Comm'rs, 65 Conn. 308, 15 Atl. 756 (1888). Accord, Lime Rock R.R. v. Farnsworth, 86 Me. 127, 29 Atl. 958 (1894); Cullen v. New York, N.H. & H.R.R., 66 Conn. 211, 33 Atl. 911 (1895).

17 "Real property," rather than "land," are the words used in Ohio Rev. Code § 717.01 (V) (1953).

18 Hamilton, G. & C. Traction Co. v. Parish, 67 Ohio St. 181, 65 N.E. 1011 (1902).

19 See text of section at note 5 *supra*.

20 Dissenting opinion of Bell, J., Village of Blue Ash v. City of Cincinnati, *supra* note 2, at 354, 182 N.E.2d at 563.

21 See, *e.g.*, Swank v. Villiage of Shiloh, 166 Ohio St. 415, 143 N.E.2d 586 (1957); Pfau v. City of Cincinnati, 142 Ohio St. 101, 50 N.E.2d 172 (1943).

22 The right of eminent domain can be restricted only by *legislative enactment* or

The fact that section 717.01 was enacted when the problems of modern airport expansion had become apparent lends support to this argument. The legislature expressly restricted the power where the condemnation would adversely affect a public utility or common carrier.[23] Since the legislature considered in what instances the power should be restricted, and included only those instances mentioned, it must have been intended that the power of condemnation should extend to all cases not so restricted. However, assuming a restriction against condemnation of land in adjoining municipal corporations could be implied as a limitation on section 717.01, it would even then be unreasonable to extend greater protection to property falling within an implied restriction than is afforded by the legislature where the power is limited by express provision. Thus, since the statute permits the power of condemnation to extend even to the property of public utilities and common carriers where the condemning municipality adequately provides for the relocation of the facility, it would appear that Cincinnati's proposal to relocate the street in question should be sufficient to support Cincinnati's answer against a demurrer.

Blue Ash asserts a right to keep its streets free from appropriation by an adjacent municipality, and relies on section 3, article XVIII of the Ohio Constitution which grants municipalities the authority to exercise the powers of local self-government and such local police regulations as are not in conflict with general laws. The maintenance of city streets by a municipality is included among the powers of local self-government[24] which, by the Home-Rule Amendment,[25] are superior to general laws of the state so far as their operation within the municipality is concerned.[26] But Cincinnati derives its power to acquire property for the construction of public utilities from article XVIII, section 4 of the Constitution of Ohio as well as section 717.01.[27] The court took the position that condemnation of such large areas of land as are required for modern airports was not within the contemplation of the framers of article XVIII, section 4 in 1912 when that section was adopted. But since airports are clearly public utilities,[28] it seems unreasonable that the legislature intended to restrict the wording exclusively to those types of public utilities in existence in 1912. Furthermore, in spite of the amount of property required by modern airports, railroads were condemning much greater land areas for essentially similar public purposes even earlier than 1912.

It would seem upon objective reflection and from a practical standpoint that the rapid expansion of urban areas and the increasing migration to sub-

constitutional amendment. Ellis v. Turnpike Comm'n, 162 Ohio St. 86, 120 N.E.2d 719 (1954); Pontiac Improvement Co. v. Board of Comm'rs, 104 Ohio St. 447, 135 N.E. 635 (1922).

23 See statutes cited note 5 *supra*.

24 Village of Perrysberg v. Ridgeway, 108 Ohio St. 245, 140 N.E. 595 (1923).

25 Ohio Const. art. XVIII, § 3 (1912).

26 Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

27 See text of statute at note 5 *supra*.

28 City of Toledo v. Board of Tax Appeals, 143 Ohio St. 141, 54 N.E.2d 656 (1944).

urban communities will intensify the need for further public appropriations of land. A suburban community, by incorporation, can put itself on a co-equal basis with the parent metropolis solely for the purpose of obstructing condemnation proceedings initiated by the metropolis. Therefore, the courts should at least consider the merits of a case for the condemnation of property for a purpose which would benefit the entire metropolitan area. The constitutional rights of a municipal corporation must in all respects be protected, but if a greater public need is present and a suitable alternative for the prior use can be provided, the fact that a community has become incorporated should not prohibit an acquisition of its land by another community without a consideration of the merits of the case.